Chapter 1

Sex and Violence in Entertainment and the Law

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Many producers of entertainment content include violent or sexual material in their works. This material presents a myriad of complex issues regarding whether and how governmental policies should address these issues, as well as fundamental First Amendment questions. From the "wardrobe malfunction" during the 2004 Super Bowl to violent actions inspired by such movies as Time Warner's *Natural Born Killers*, sex and violence in the media are important topics in the field of entertainment law.

Polls showed that between 75 to 80 percent of Americans believed that violence and sex in entertainment pose significant social problems—by attracting and inspiring people to this kind of behavior and numbing them to its consequences. But while 80 to 90 percent of the public wanted more parental and corporate supervision in this area, less than 30 percent wanted more government censorship of entertainment speech. Still, Time Warner products such as *Natural Born Killers*, *The Jenny Jones Show*, and *Cop Killer* all produced both killings and lawsuits that we will be reading about soon. Indeed, the most profitable as well as most publicized movie ever by Mel Gibson, *The Passion of the Christ*, also generated another important event for this chapter. The 21–year old Dan Randall Leach had been a regular viewer and fan of the TV series, *Crime Scene Investigation* (CSI), in his family home in Richmond, Texas. In January 2004, though, Leach learned that his 19–year old girlfriend, Ashley Nicole Wilson had become pregnant and wanted the couple to get married. Using a lesson he had learned from watching a CSI episode, Leach tied a ligature cord around Wilson's neck, strangled her on her bed, and left a forged suicide note beside her. When the body was found the next day, the medical examiner and police decided this actually was a suicide. However, two months later, after watching Jesus being crucified in *Passion*, Leach immediately went to both his church and the sheriff's office to confess to having murdered Wilson to try to secure redemption from this truly mortal sin. Thus *Passion*—by contrast with CSI—is a very novel illustration of how entertaining works may be shaping our real lives, the subject of Chapter One

Another major legal battle was produced in 2004 by what has long been the most popular television program—the Super Bowl. In the half-time interval between the New England Patriots winning their second NFL Championship in three years in the last minute, Justin Timberlake suddenly bared the breast of his partner Janet Jackson just as they were reaching the last line in their lyrics, "I'll have you naked by the end of this song." What 90 million Americans had viewed thus produced fines for the television stations owned by the producer of this half-time act, a reversal by the FCC of its legal treatment of U2 frontman Bono's use of the "F" word as he was receiving a music award a year earlier, and a major debate in Congress about whether and how to ban the strength of the legal ban on sexual indecency on television. This likely will produce even more legal as well as political battles about the issues posed in Chapter One.

Any such governmental actions generate not just popular concerns, but also constitutional challenges. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech." This crucial constitutional edict imposes very steep hurdles to any governmental effort to restrict the content of entertainment products—whether sex, violence, invasions of personal privacy and reputation, or other examples addressed in this part. Indeed, the First Amendment has recently become a significant lever in the struggle by entertainment conglomerates to fend off Congressional efforts to shape the underlying structure of the entertainment marketplace, which we will see in Part Four.

The First Amendment poses two fundamental types of questions. The first type, substantive in character, asks *what* kinds of speech regulation, if any, are permissible, and indeed, what is "speech" in the first place (e.g., whether speech includes burning a flag or dancing nude). The second theme, this one institutional, is *who* should resolve those controversies about where to draw the line between speech and action, between individual freedom and community values: courts listening to lawyers, legislators to voters, or businesses to customers?

An appalling event that took place in the spring of 1999 then generated a major political as well as legal debate about whether we should be rethinking these legal policy issues in this new millennium. Two students at the Columbine High School in Littleton, Colorado, Eric Harris and Dylan Klebold, had come to school on April 20th carrying guns and bombs under their coats. As pro-Nazi members of a Trenchcoat Mafia group, these two teenagers planned to memorialize Hitler's birth date by "Killing Them All." In fact, the two ended up murdering twelve other students and a teacher (who actually sacrificed his life to save a host of other students) before committing suicide themselves.

These Columbine high school killings were just one of a series of violent tragedies in American high schools in the last two decades. This

one did set off major debates among politicians, the media, and the general public about what should be done to stop this happening so often in the 21st Century. (One lawyer characterized the Columbine killings as "the Pearl Harbor of American culture.") One focus of concern was about the families, schools, and extracurricular programs in which these students were living, studying, and sometimes preparing for such horrid actions. A second concern was the relatively easy access now afforded to guns that make such deadly actions possible. A third, and the one that is directly relevant to this subject and book, is the contribution that the world of entertainment may be making to the nation's culture of violence.

For example, Harris and Klebold were reported to be both regular viewers of movies and television shows with vivid violent scenes and fans of death cult musicians like Marilyn Manson. Even more important in their daily lives was the interactive computer game *Doom*, in which the participants must pursue and kill each other to be able to win their games. Young Lee Malvo was recruited by an evil John Muhammad and trained by both playing the video game *Ghost Recon* and watching a *Matrix* home video more than 100 times before going out in 2002 to assassinate 10 people around Washington D.C. While Malvo's lawyer was not able to get him fully acquitted by reason of insanity, he did use this to avoid the death penalty being sought by Attorney General John Ashcroft for him, one that was meted out to his evil mentor.

However, among those who have succeeded in this *Matrix* insanity defense were the 27–year old Vadim Mieseges who had killed his San Francisco landlord in 2000 and the 37–year old Tanda Lynn Ansley who in May 2003 killed a Miami University professor in Ohio. That same year Josh Cooke, a 19–year old addicted *Matrix* fan dressed himself in the same brand and color of trench coat worn by actor Keanu Reeves playing the lead character Neo, armed himself with a Neo-like 12–gauge shotgun, and went down to the family basement to shoot and kill both his mother and father (the latter being the President of the University of the District of Columbia). After calling the police to come and arrest him, Cooke had a lawyer, Rachel Fierro, appointed to defend him. Fierro then filed a motion claiming that his client had a "bona fide belief that he was living in the virtual reality of *The Matrix*," and thus had the Fairfax Circuit Court appoint a psychiatrist to examine whether Cooke had become insane under criminal law.

Thus, six weeks after the Littleton tragedy, Congress had proposed and President Clinton had commissioned an 18–month study by the Federal Trade Commission of how to stop violent entertainment products from being targeted at teenage audiences (though no such political accord could be reached about how to reduce ready teenager access to guns). This FTC Report was issued in the fall of 2000, producing immediate responses from the entertainment industry, but no governmental action. So the parents of the children in Littleton who had lost their lives hired lawyers to bring tort suits against the suppliers and producers of the movies and

video games as well as the guns they believed had produced these Columbine killings.

We should all be aware now that we will be reading and learning from the cases and materials in this book that neither Congress nor the courts believe there to be an intrinsic incompatibility between the rule of law and freedom of speech. A major issue for us to consider is why the same companies that appeal to the First Amendment to challenge the laws depicted in Parts I and IV of this book also make affirmative use of copyright (Part II) and contract law (Part III) to preclude others speaking freely with what the companies believe is their intellectual or talent property. Thus, a key reason for taking this course and reading this book is to learn not just about the intrinsic features of each legal and industry subject, but also to witness the interplay and thence the complexities of the issues presented by each.

A. ENTERTAINMENT AND THE FIRST AMENDMENT[a]

To the senior citizens in the entertainment world, this preoccupation with the role of the First Amendment in their business is a comparatively new phenomenon. Indeed, for this nation's first century and a half, the Supreme Court left this provision almost totally unused, even in the explicitly political context. Until the New Deal of the 1930s, the Court considered the most important constitutional freedom to be freedom of contract, along the lines of *Lochner v. New York*, 198 U.S. 45 (1905). The flip side of this judicial preoccupation with the virtues of a private market (shaped to some extent by federal antitrust law) was that the Supreme Court ruled, in *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), that as a profit-oriented industry, the entertainment world was not entitled to a constitutional guarantee of "freedom of speech."

a. Among the countless scholarly books and articles on the First Amendment are two treatments from somewhat different intellectual perspectives: Rodney A. Smolla, *Free Speech In An Open Society* (Alfred Knopf, 1992), and Cass R. Sunstein, *Democracy and the Problem of Free Speech* (The Free Press, 1993). And the subject matter of this chapter has produced a host of books over the last decade. Among the notable works are Kevin W. Saunders, *Violence as Obscenity: Limiting the Media's First Amendment Protection* (Duke U. Press, 1996); John Leonard, *Smoke and Mirrors: Violence, Television and Other American Cultures* (The New Press, 1997); Sissela Bok, *Mayhem: Violence as Public Entertainment* (Perseus Books, 1998); Jeffrey Goldstein, ed., *Why We Watch: The Attractions of Violent Entertainment* (Oxford U. Press, 1998); James T. Hamilton, *Channeling Violence: The Economic Market for Violent Television Programming* (Princeton U. Press, 1998); and Marjorie Heins, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth* (Hill and Wang, 2001); and among the list of recent law review articles, those that engaged in in-depth analysis of the legal treatment of entertaining violent films and songs were Forouzan M. Khalili, *Television Violence: Legislation to Combat the National Epidemic*, 18 Whittier L. Rev. 219 (1996); Sandra Davidson, *Blood Money: When Media Expose Others to Risk of Bodily Harm*, 19 Hast. Comm/Ent L.J. 225 (1997); Jendi Reiter, *Serial Killer Trading Cards and First Amendment Values: A Defense of Content–Based Regulation of Violent Expression*, 62 Albany L. Rev. 183 (1998); Kevin W. Saunders, *Electronic Indecency: Protecting Children in the Wake of the Cable and Internet Cases*, 46 Drake L. Rev. 1 (1998); and R. Polk Wagner, *Filters and the First Amendment*, 83 Minnesota L. Rev. 755 (1999).

The infant motion picture industry first appeared on the American scene at the beginning of the 20th century. One or two-reel films were shown in "nickelodeon" booths for a five cent admission charge. Civic and religious groups were concerned about the impact of this intense new visual experience on a largely working class audience (whose adults, let alone its children, often could not read). Both local and state authorities quickly responded with laws that sought to ensure the moral quality of this new product. In *Mutual Film*, a film distribution company challenged the early Ohio legislation that required every film to be shown to the state board of censors, which would only license the film to be shown in the state if it displayed "a moral, educational or amusing and harmless character." At the time, the Court had not yet ruled that the First Amendment guarantees of the federal Constitution were applicable to the states. However, the Court did have to construe and apply Ohio's state constitution, which precluded passage of any law that "restrains or abridges the liberty of speech, or of the press." The Court felt that it "strained . . . common sense" to try to fit "moving pictures"—or the theater, the circus, and other shows and spectacles—within constitutional guarantees of free opinion, speech, and the public press:

> It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, not intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.

236 U.S. at 244–45.

Four decades later, the Supreme Court reversed the constitutional course of the entertainment industry in a case that provides an intriguing picture of the kinds of movies that people found troubling as late as the 1950s. The subject of this case was a forty minute Italian movie, *The Miracle*, made by one of the great film directors, Roberto Rossellini, and starring Anna Magnani and Federico Fellini. The essence of the movie's story was conveyed through this critic's summary reproduced in Justice Frankfurter's concurring opinion in the decision we are about to read:

> A poor, simple-minded girl is tending a herd of goats on a mountainside one day, when a bearded stranger passes. Suddenly it strikes her fancy that he is St. Joseph, her favorite saint, and that he has come to take her to heaven, where she will be happy and free. While she pleads with him to transport her, the stranger gently plies the girl with wine, and when she is in a state of tumult, he apparently ravishes her. (This incident in the story is only briefly and discreetly implied.)

> The girl awakens later, finds the stranger gone, and climbs down from the mountain not knowing whether he was real or a dream. She meets an old priest who tells her that it is quite possible that she did see a saint, but a younger priest scoffs at the notion. 'Materialist!' the old priest says.
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> There follows now a brief sequence—intended to be symbolic, obviously—in which the girl is reverently sitting with other villagers in church. Moved by a whim of appetite, she snitches an apple from the basket of a woman next to her. When she leaves the church, a cackling beggar tries to make her share the apple with him, but she chases him away as by habit and munches the fruit contentedly.
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> Then, one day, while tending the village youngsters as their mothers work at the vines, the girl faints and the women discover that she is going to have a child. Frightened and bewildered, she suddenly murmurs, 'It is the grace of God!' and she runs to the church in great excitement, looks for the statue of St. Joseph, and then prostrates herself on the floor.
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> Thereafter she meekly refuses to do any menial work and the housewives humor her gently but the young people are not so kind. In a scene of brutal torment, they first flatter and laughingly mock her, then they cruelly shove and hit her and clamp a basin as a halo on her head. Even abused by the beggars, the poor girl gathers together her pitiful rags and sadly departs from the village to live alone in a cave.
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> When she feels her time coming upon her, she starts back towards the village. But then she sees the crowds in the streets; dark memories haunt her; so she turns towards a church on a high hill and instinctively struggles towards it, crying desperately to God. A goat is her sole companion. She drinks water dripping from a rock. And when she comes to the church and finds the door locked, the goat attracts her to a small side door. Inside the church, the poor girl braces herself for her labor pains. There is a dissolve, and when we next see her sad face, in close-up, it is full of a tender light. There is the cry of an unseen baby. The girl reaches towards it and murmurs, 'My son! My love! My flesh!'

In Italy, *The Miracle* received mixed reviews, including the review by the movie critic for *L'Osservatore Romano*, the publishing organ of the Vatican. While some critics objected to certain artistic features of the film, as well as its depiction of "illegitimate motherhood" and "carnality," the critic for *Il Popolo*, published by the Christian Democratic Party, called the picture a "beautiful thing." The Vatican's movie reviewing arm, the Catholic Cinematographic Center, called *The Miracle* "an abominable profanation from religious and moral viewpoints." Despite the Center's prerogative under Italian law to block exhibition of movies deemed offensive to Catholics, it did not ask for such censure and *The Miracle* was shown in Italy with mixed box office results. A year later, with the

Vatican's approval, Rossellini used Italian members of the Franciscan Order as part of the cast for his filming of the life of St. Francis.

Under New York Education Law at that time, the Motion Picture Division of the New York State Education Department screened pictures and issued licenses for viewing unless the "film or a part thereof is obscene, indecent, immoral, inhumane, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." For the American market, *The Miracle* was combined with two French films, Jean Renoir's *A Day in the Country* and Marcel Pagnol's *Jofre*, under the joint title, *Ways of Love*, and was licensed for release by film distributor Joseph Burstyn in New York in 1950. Most New York critics praised *Ways of Love*, which was voted best foreign film of the year.

A private Catholic organization, the National Legion of Decency, attacked *The Miracle* as "a sacrilegious and blasphemous mockery of Christian religious truth," and New York's Cardinal Spellman issued a statement for reading at all Masses in the city on Sunday, January 7, 1951, condemning the film and calling for a tightening of state censorship law. Again, a number of notable Catholics, such as Notre Dame professor William Clancy, writing in the Commonweal, and the well-known poet and critic, Allen Tate, firmly disagreed. In response to the religious and political outcry, the Chair of the New York Board of Regents appointed a special three-member committee of the Board to reconsider the Division's original licensing decision. After the committee members had rescreened *The Miracle* and decided that it was sacrilegious, the Board as a whole revoked the picture's license on February 16, 1951. The Board's reasons were that "the mockery or profaning of these beliefs that are sacred to any portion of our citizenship is abhorrent to the laws of this great State." The constitutionality of that Board action eventually reached the Supreme Court.

JOSEPH BURSTYN, INC. v. WILSON

Supreme Court of the United States, 1952.
343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098.

MR. JUSTICE CLARK delivered the opinion of the court.

[After detailing the above factual background, the opinion for the Court described and quoted from the earlier *Mutual Film* precedent, and then continued.]

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In a series of decisions beginning with *Gitlow v. New York*, 268 U.S. 652 (1925), this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. That principle has been followed and reaffirmed to the present day. Since this series of decisions came after the *Mutual* decision, the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of "speech" or "the press."

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters v. New York*, 333 U.S. 507, 510 (1948):

> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp. v. Industrial Comm'n*, supra, is out of harmony with the views here set forth, we no longer adhere to it.[12]

To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas.[13] Nor does it

12. *See United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948): "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." It is not without significance that talking pictures were first produced in 1926, eleven years after the *Mutual* decision. Hampton, *A History of the Movies* (1931), 382–383.

13. E.g., *Feiner v. New York*, 340 U.S. 315 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that "the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case.

New York's highest court says there is "nothing mysterious" about the statutory provision applied in this case: "It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . ." This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

Since the term "sacrilegious" is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us.[20] We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious."

Reversed.

Burstyn was a crucial legal event for the entertainment world because it rejected the *Mutual Film* premise that simply because movie distribution was a business for private profit, it did not enjoy the constitutional freedom afforded to "speech." The Court did add that a motion picture, like other methods of expression, might "present its own peculiar problems" that precluded application of "the precise rules" governing other media. We will see later in this chapter (and again in Chapter 13) the significance of that judicial qualification in connection with the Court's treatment of broadcasting. In the meantime, in *Kingsley International Pictures v. Regents of the University of the State of New York*, 360 U.S. 684 (1959), the Supreme Court overturned the New York Motion Picture Division's refusal to license showing of the movie version of D.H. Lawrence's famous novel, *Lady Chatterley's Lover*, because of the Division's judgment that the film portrayed adultery as "desirable, acceptable, or a proper pattern of behavior." In *Kingsley*, the Court made it clear that Americans had as much of a First Amendment right to advocate adultery as they did atheism or socialism.

Ironically, in the same decade in which the Supreme Court was giving the movie industry these favorable verdicts in *Burstyn* and *Kingsley*, the Court was also holding that citizens did not have a First Amendment right to advocate the ideology of the Communist Party (see *Dennis v. United States*, 341 U.S. 494 (1951)), and that while adultery could be portrayed as socially acceptable, its sexual component could not be displayed in a visibly "obscene" fashion (see *Roth v. United States*, 354 U.S. 476 (1957)). Thus, as a prelude to our investigation of the current constitutional status of entertaining "speech for fun and profit," it is important to have at least a capsulized version of the key issues and rulings that have transformed the First Amendment from what it was like at the time of the *Burstyn* ruling.

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20. In the *Near* case, this Court stated that "the primary requirements of decency may be enforced against obscene publications." 283 U.S. 697, 716. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942), Justice Murphy stated for a unanimous Court: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . ."

The one point that nearly everyone now agrees upon is that judges cannot simply apply the text of the First Amendment to every contested case. Indeed, in important respects the literal wording has been expanded by the Court to encompass restraints on speech by state entities (as in *Burstyn*) as well as by Congress, and to protect demonstrative actions (e.g., flag burning in *Texas v. Johnson*, 491 U.S. 397 (1989)) as well as speech in the ordinary meaning of that term. At the same time, not every restraint on expression is considered an "abridgment of the freedom of speech" for constitutional purposes. For example, if director Rossellini had included as part of the opening credits of *The Miracle* an apparent endorsement by the Pope, or the movie's producer had said in its securities offering that the National Legion of Decency had invested in the production, or the American distributor's advertisements pictured Cardinal Spellman telling Catholics to go see the film, the laws of trademark, securities, libel, and unfair trade practices would definitely have been (and still could be) brought to bear on such "speech." And so far the courts have ruled that even stronger restraints can be placed on personal efforts to transmit videos of movies like *The Miracle* to friends and colleagues over the Internet.

That same leeway is afforded the government to deal with speech that constitutes perjury in courts, soliciting or conspiring to commit murder, giving legal or medical advice without a license to practice, requesting sex in return for a promotion, selling confidential information, and the like. The question, then, is what the proper dividing line is between such permissible constraints on speech and what everyone would now agree is an unconstitutional ban on a "sacrilegious" movie like *The Miracle*. Answering that question requires grappling with the fundamental issue of why speech requires qualitatively different protection than other conduct from the legislative policy judgments arrived at via the usual political process.

Shortly after *Mutual Film*, two of the most oft-cited judicial explanations of the First Amendment's role were offered by Justices Oliver Wendell Holmes and Louis Brandeis. Justice Holmes expressed his point of view in *Abrams v. United States*, 250 U.S. 616 (1919), which dealt with federal prosecution of Russian–Jewish immigrants who had criticized the American government for providing military support to those who were trying to fend off the revolution in Russia.

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only grounds upon which their wishes safely can be carried out.

250 U.S. at 630. Justice Brandeis stated his perspective in *Whitney v. California*, 274 U.S. 357 (1927), a case in which a Communist labor leader was prosecuted:

> Those who won our independence ... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a public duty; and that this should be a fundamental principle of the American government.

274 U.S. at 375. While there are significant differences between the two Justices' respective "competitive market" and "civic republicanism" premises for the distinctive value of free speech, a common feature is that the passages were written in cases in which the Court was upholding convictions for the speech of both Abrams and Whitney.

Another constitutional view shared by Justices Holmes and Brandeis, the legitimacy of government regulation of the business market, emerged triumphant in the late 1930s when the Supreme Court did its "switch in time that saved nine" and upheld President Roosevelt's New Deal by repudiating the constitutional version of "liberty of contract" articulated in *Lochner v. New York*, 198 U.S. 45 (1905). The Supreme Court overturned criminal convictions for speech, in *De Jonge v. Oregon*, 299 U.S. 353 (1937), and *Herndon v. Lowry*, 301 U.S. 242 (1937) (involving Communist activists prosecuted for what they had been saying in labor and civil rights disputes respectively). Yet, a conspicuous feature of the political New Deal was the adoption of comprehensive regulation of business practices involving speech: securities offerings, food and drug and other trade advertising, labor representation campaigns, and the allocation and control of broadcasting licenses under the new Communications Act. It is understandable, then, that a posture of judicial restraint in imposing constitutional limits on the actions of popularly elected governments was also exhibited in the context of speech. Besides the *Dennis* and *Roth* cases mentioned above, another noteworthy First Amendment ruling was *Beauharnais v. Illinois*, 343 U.S. 250 (1952), in which the Court upheld a state conviction of the president of a White Circle League for circulating racist leaflets calling on the people of Chicago to block the "Negro invasion of their neighborhoods" in violation of a state law that prohibited libel of racial or religious groups.

In sum, in 1952 when *Burstyn* was being decided, the Court's bringing of the entertainment industry under the umbrella of the First Amendment had somewhat more symbolic than practical significance. After all, the so-called Golden Age of Hollywood in the 1930s and 1940s had taken place when *Mutual Film* was the law on this question. The real impact of *Burstyn* came in the 1960s, when the Supreme Court dramatically enhanced the constitutional protection afforded to any kind of speech. Two of the key rulings were byproducts of the civil rights movements, though from opposing ends of that spectrum.

The first, *New York Times v. Sullivan*, 376 U.S. 254 (1964), was precipitated by a full-page advertisement in the New York Sunday Times, in which a number of civil rights organizations and supporters protested the "wave of terror" that had been instituted by southerners and the police to try to quell the peaceful protest movement of Dr. Martin Luther King and his supporters. Sullivan, one of the elected commissioners in Montgomery, instituted a defamation lawsuit against the Times and several clergymen signatories to the advertisement. Although Sullivan had not been mentioned in the advertisement and only a handful of copies of the Sunday Times were actually sold in Alabama, a jury found that Sullivan had been libeled by several inaccuracies in the ad, and awarded him $500,000 in damages.

This award under state common law was overturned by the Supreme Court in what many scholars believe to be the most important step in the evolution of judicial understanding of "the central meaning of the First Amendment" (376 U.S. at 273).[b] The tort law of defamation had to be constrained by a

> profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

376 U.S. at 270. Because it was as much the duty of citizens to criticize government as it was the officials' duty to administer it, citizen performance of that duty required broad constitutional immunity—absent "actual malice" in the sense of knowledge or reckless disregard of the falsity of a harmful statement—from the threat of damage suits by officials concerned about the effect of criticism on their reputations.

The second major precedent, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), afforded constitutional protection to speech by Clarence Brandenburg, leader of an Ohio branch of the Ku Klux Klan. Brandenburg's speech to this gathering of hooded, cross-burning Klan members vilified Blacks and Jews, and ended by saying that:

> If our President, our Congress, our Supreme Court continues to suppress the white Caucasian race, it's possible that there might have to be some revengeance [sic] taken.

Brandenburg, whose speech happened to be filmed and telecast, was prosecuted and convicted under Ohio's Criminal Syndicalism legislation, which prohibited

> advocacy of the duty, necessity or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.

b. *See* Harry Kalven Jr., The New York Times *Case: A Note on the Central Meaning of the First Amendment*, 1964 Sup. Ct. Rev. 191; Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 Colum. L. Rev. 603 (1983).

The Supreme Court overturned its earlier precedent, *Whitney v. California*, 274 U.S. 357 (1927), and ruled that it would violate the First Amendment to punish the pure *advocacy* of illegal force. Only "advocacy directed to inciting or producing *imminent* lawless action and [that] is likely to incite or produce such action" could constitutionally be made illegal. Illustrating how far the First Amendment had journeyed from *Abrams* (1919), *Dennis* (1951), and other such precedents was the Court's ruling in *Hess v. Indiana*, 414 U.S. 105 (1973), that there was no "clear and present danger" that could justify conviction of the leader of an anti-Vietnam War group who, when the police were breaking up his demonstration, told the sheriff that "we'll take the fucking street later."

A thread running through almost all of the Supreme Court precedents mentioned to this point is that they involved *political* speech by people who were dissenting from actions taken by government over some question of public policy. Later on in this chapter we shall observe the significance of *Brandenburg* and *Hess* for lower court scrutiny of both public and private efforts to control the level of violence portrayed in film and music. The scope and impact of *New York Times* was itself sharply expanded in the late 1960s in a case, *Time, Inc. v. Hill*, 385 U.S. 374 (1967), that involved an early example of what is now a key entertainment industry product—the docudrama.

The Hill family had been the victims of a highly-publicized 1952 hostage-taking by three escaped convicts who were using the Hills' suburban Philadelphia home. Luckily the Hills all emerged unscathed from what had been non-violent, even courteous, treatment by the convicts. Nonetheless, distraught by the experience, the Hills moved to Connecticut and avoided all efforts to remain in the media spotlight.

A year later, a book, *The Desperate Hours*, appeared, a fictional portrayal of a suburban family that had been the victim of similar hostage-taking by escaped convicts, though this one was marked by physical brutality and sexual harassment. When *The Desperate Hours* was turned into a Broadway play for the 1954–55 season, Life Magazine explicitly tied the storyline to the Hills' experience. Indeed, Life had pictures taken in the Philadelphia home of the various actors playing the Hills family and the convicts, reenacting some of the purportedly violent incidents as depictions of the play's "heart-stopping account of how a family rose to heroism in a crisis."

The Hills' reaction to that account was to sue Time–Life for violating New York's "right to privacy" legislation. The New York Court of Appeals had ruled, in *Warren Spahn v. Julian Messner*, 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543 (1966), that while the New York legislation did not preclude "factual reporting of newsworthy persons and events" (even if the persons had been involuntarily rendered newsworthy), it did preclude fictionalized portrayals that were "inaccurate and distorted." The Hills won a $75,000 jury verdict under the legislation. Time–Life then appealed to the Supreme Court, with Richard Nixon serving as the Hills'

attorney in his one appearance in the Court as counsel rather than client. A closely-divided Supreme Court overturned the jury verdict on the grounds that "knowing or reckless disregard of falsity"—rather than negligent failure to make a reasonable investigation—was the constitutional predicate to such a privacy suit by a private individual (as well as the defamation claim by the public official in *New York Times Co. v. Sullivan*):

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as these are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press ... We have no doubt that the subject of the *Life* article, the opening of a new play linked to an actual incident, is a matter of public interest ... We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to a defamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity....

385 U.S. at 388–89.

We shall trace in the next chapter the impact of *Time, Inc. v. Hill* on the evolution of individual privacy and publicity rights in a world of docudramas and tabloid television. More immediately relevant to the subject of this chapter was a fifteen-year debate among the Supreme Court's members, following its decision in *Roth v. United States*, 354 U.S. 476 (1957), about whether and to what extent government could restrain depictions of explicit sex—pornography in lay terms, obscenity or indecency in legal terms. Just a year after *Time, Inc. v. Hill*, the Court in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968), struck down a Dallas city ordinance that provided for prior viewing of films by a citizen's Motion Picture Classification Board for purposes of classifying certain movies as "not suitable for young persons" (less than 16 years of age). The standards for "lack of suitability for young persons" were:

> (1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be ... likely to incite or encourage crime or delinquency on the part of young persons; or
>
> (2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be ... likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.
>
> ... In determining whether a film is "not suitable for young persons," the Board shall consider the film as a whole, rather than isolated scenes, and shall determine whether its harmful effects outweigh artistic or educational values such films may have for young persons.

Films classified by the Board as unsuitable had to be advertised as such by the motion picture exhibitor, and admission was denied to children under 16 unaccompanied by their parents.

Relying on *Burstyn*, the Court concluded that the "vice of vagueness" reflected in these licensing standards was seriously detrimental to the constitutional rights of the motion picture industry and its fans.

> It may be unlikely that what Dallas does in respect to the licensing of motion pictures would have a significant effect upon film makers in Hollywood or Europe. But what Dallas may constitutionally do, so may other cities and States. Indeed, we are told that this ordinance is being used as a model for legislation in other localities. Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than run that risk, he might choose nothing but the innocuous, perhaps save for the so-called "adult" picture. Moreover, a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults—perhaps a "Viva Maria"—may contract to show only the totally inane. The vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison. The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor, and certainly broader than those of youths under 16.

390 U.S. at 683–84. And the fact that the technique for Dallas' regulation of film expression was "one of classification rather than direct suppression" could not save this "system of informal censorship" from constitutional challenge by the film in question, *Viva Maria*.

An immediate byproduct of *City of Dallas* was that the movie industry, acting through its arm, the Motion Picture Association of America (MPAA), developed its own system of film ratings for sex and violence (which we will examine later in this chapter). Five years later (and sixteen years after *Roth*), the Supreme Court, in *Miller v. California*, 413 U.S. 15

(1973), finally settled on the still-prevailing formula about what kinds of works governments can constitutionally restrict as sexually "obscene." The basic guidelines are

> (a) whether the average person, applying contemporary community standards, would find that the work taken as a whole, appeals to the prurient interest,
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,
>
> (c) and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24. Having to satisfy all three of these components to the constitutional standard in practice now limits government regulation of movies to those that constitute "hard core pornography"—about which at least some of the Justices believe they "know it when they see it" (see *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)).

An intriguing illustration of how far both the movie and legal worlds have moved in the five decades since the *Burstyn* decision was the 1995 movie *Priest*. This was a story about two priests in Liverpool, England, one having an affair with the housekeeper, the other having several homosexual encounters. The movie was distributed in the United States by Miramax, a division of the long-time leader in family pictures, the Walt Disney Company. Though New York's Cardinal O'Connor (and then-Senator Robert Dole) denounced *Priest* as an offensive portrayal of the Catholic clergy, and the Knights of Columbus tried to arrange a boycott of theaters where the movie was being shown, no one would have dreamed of the government banning *Priest* from the screen.

The politics of the First Amendment experienced an intriguing twist in the 1980s. Until then, the same people—"liberals"—who had pressed for governmental regulation of contractual relations also vigorously defended freedom of speech from legal constraints, while their opponents—"conservatives"—who were fighting for freedom of contract in business and labor markets also supported governmental controls on speech to preserve public safety and morality. More recently, though, the question of what to do about speech that threatens gender and racial equality has fractured both these left and right coalitions.

In the 1980s, feminist legal scholarship (especially the work of Catherine MacKinnon) sought to reformulate our understanding of the legitimate roles of antipornography law in ways that would both narrow and expand the constitutional concept of "obscenity." Rather than focusing as *Miller* did, on works that appeal to *prurient* interests in sexual practices that are *patently offensive* to a community's moral and religious standards of appropriate sexual behavior, MacKinnon argued that the law should target only that sexual content that risks specific kinds of harm to

women—their portrayal in violent, degrading, or subordinating sexual encounters with men. The harm this law would aim at might be inflicted on the women actually being portrayed in the product (e.g., a pornographic movie, though not a book), or upon those who were later attacked, sexually harassed, or otherwise mistreated by the male viewers of the product. However prurient and offensive these might seem to the community, explicit portrayals of egalitarian sexual encounters would be legalized. At the same time, violent pornography against women would not enjoy constitutional protection even if it did have "serious literary or artistic value."

This controversial new theory did have a major influence on the way the Supreme Court of Canada reformulated that country's obscenity laws and upheld them against challenge under Canada's Charter of Rights and Freedoms. See *R. v. Butler*, 89 D.L.R. (4th) 449 (S.C.C. 1992). To make Canadian obscenity law compatible with the new constitutional right of "freedom of expression," Canada's Supreme Court interpreted the relevant provisions in its Criminal Code as no longer barring all graphic portrayals of sex. Instead, the sexual episodes had to be either violent, degrading or dehumanizing to women. (Even then, there would be an "artistic" exclusion from criminal liability.) In the United States, a number of local governments sought to embody this new intellectual perspective in their legal ordinances—most prominently Indianapolis. A city ordinance of the early 1980s placed pornography within the administratively and judicially-enforceable bars to discrimination against women. For this purpose, the law defined "pornography" as "the graphic sexually explicit subordination of women, whether in pictures or in words" in a variety of ways: women presented as sexual objects who enjoy pain or humiliation; women who experience sexual pleasure in being raped, tied up, cut up, or mutilated; women penetrated by objects or animals; women presented in scenarios of degradation, torture, or hurt, in a context that makes these conditions sexual. More generally, pornography would consist of the presentation of women "as sexual objects for domination, conquest, violation, exploitation, possession or use, or through postures or positions of servility or submission or display." The Indianapolis ordinance was challenged in front of the Seventh Circuit Court of Appeals in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), authored by Judge Frank Easterbrook.

In the court's view, the fact that the Indianapolis ordinance excluded the most graphic depictions of sex as long as women were portrayed as equals, while deeming pornography to consist in presentation of women as "enjoying pain, humiliation, or rape" or in "positions of servility or display," made the law more, not less, constitutionally offensive:

> . . . This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenets of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.

Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]."

Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depends on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. Communism is a world view, not simply a Manifesto by Marx and Engels or a set of speeches. Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government. Religions affect socialization in the most pervasive way. The opinion in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), shows how a religion can dominate an entire approach to life, governing much more than the relation between the sexes. Many people believe that the existence of television, apart from the content of specific programs, leads to intellectual laziness, to a penchant for violence, to many other ills. The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution—a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing

critical speech. In the United States, however, the strength of the support for this belief is irrelevant. Seditious libel is protected speech unless the danger is not only grave but also imminent. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument. Television scripts contain unarticulated assumptions. People may be conditioned in subtle ways. If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

771 F.2d at 328–30.

Another argument by the City was that it wanted to protect actresses in violent pornographic films from experiencing the harm of sexual violence depicted in these works. Judge Easterbrook noted that while government can and should directly target this kind of harmful action by producers engaged in making the film, this objective clearly could not justify an ordinance that also banned sexual violence in books. Even with respect to movies, this argument would not suffice:

> The more immediate point, however, is that the image of pain is not necessarily pain. In *Body Double*, a suspense film directed by Brian DePalma, a woman who has disrobed and presented a sexually explicit display is murdered by an intruder with a drill. The drill runs through the woman's body. The film is sexually explicit and a murder occurs—yet no one believes that the actress suffered pain or died. In *Barbarella* a character played by Jane Fonda is at times displayed in sexually explicit ways and at times shown "bleeding, bruised, [and] hurt in a context that makes these conditions sexual"—and again no one believes that Fonda was actually tortured to make the film. In *Carnal Knowledge* a woman grovels to please the sexual whims of a character played by Jack Nicholson; no one believes that there was a real sexual submission, and the Supreme Court held the film protected by the First Amendment. *Jenkins v. Georgia*, 418 U.S. 153 (1974). And this works both ways. The description of women's sexual domination of men in *Lysistrata* was not real dominance. Depictions may